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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1055

RUSSELL TRAIN, Administrator,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

WASHINGTON AREA BICYCLIST ASSOCIATION, INC., METROPOLITAN WASHINGTON COALITION FOR CLEAN AIR, INC., BREATHERS FOR THE REDUCTION OF ATMOSPHERIC HAZARDS TO THE ENVIRONMENT,
Petitioners-Intervenors

v.

DISTRICT OF COLUMBIA, ET AL.

On Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR PETITIONERS-INTERVENORS

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BRIEF FOR PETITIONERS-INTERVENORS

OPINION BELOW

The opinion of the court of appeals is reported at 521 F. 2d 971.

JURISDICTION

The judgment of the court of appeals was entered on on October 28, 1975 (U.S. Pet. App. B, 126a-128a). The petition for writ of certiorari was filed on January 26, 1976 and was granted on June 1, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to reduce air pollution from sources owned and operated by the State.

2. Whether, if the Clean Air Act grants the EPA Administrator such statutory authority, the Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

I. The pertinent provisions of the Constitution of the United States are Article I, Section 8, Clauses 3 and 18; Article IV, Section 4; Article VI; and the Tenth Amendment.

II. The relevant statute is the Clean Air Act, 42 U.S.C. § 1857 *et seq*; in particular Sections 110 and 113. Pertinent sections of the Act and the EPA regulations in issue are set forth in the Appendix to the Administrator's Petition for Certiorari (U.S. Pet. App. A, 59a-125a, and C, 129a-159a).

STATEMENT

In 1970 Congress amended the Clean Air Act to create a process for reducing air pollution throughout the United

States to levels which would protect human health and public welfare.[1] The Act requires the Administrator of the Environmental Protection Agency (EPA) to promulgate, after public comment, national ambient air quality standards adequate to protect against adverse health and welfare effects.[2] Section 110 of the Act specifies a process for establishing State programs to achieve and maintain the national ambient air quality standards. EPA is required to review the State programs, submitted to EPA as "State Implementation Plans," and to promulgate substitute Plans by Federal regulation for States whose Plans are not adequate. Section 110(a) and (c).

This Court has noted on several occasions, that in Section 110 Congress prescribed broad objectives to test the adequacy of State Implementation Plans, leaving to the States the specific choices as to how air pollution within their boundaries would be reduced. *Train* v. *Natural Resources Defense Council, Inc. (NRDC)* 421 U.S. 60, 79 (1975). *Union Electric Co.* v. *EPA*, 96 S. Ct. 2518, 2529 (1976). The principal requirement of Section 110 is that the State Implementation Plans achieve air quality protective of human health (primary ambient air quality standards) by 1975.

Although Section 110 requires that the State Plans be submitted by January 1972, EPA required submission only of partial Plans by this date and granted the States more time to devise programs to reduce motor vehicle pollution. Suit was brought to challenge this delay and EPA was ordered to direct the States to complete their Plan submissions and also was ordered to promulgate substitute Plans for States not submitting adequate Plans. *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973).

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[1] Act of December 31, 1970, P.L. 91-604, 84 Stat. 1676, *amending* 42 U.S.C. § 1857 *et seq*.

[2] Section 109, 42 U.S.C. § 1857-4. For the purpose of clarity, Section references to the Act will be used.

For various States which failed to submit adequate Plans EPA proposed substitute Plans and promulgated Plan regulations late in 1973. Some of the regulations EPA promulgated imposed duties upon States or their political subdivisions to manage the use of state-owned streets and highways by motor vehicles and to establish a program for emission inspection and maintenance of automobiles registered by the State for use on its roads. The States of Arizona, California, Maryland, Pennsylvania, Virginia and the District of Columbia, among others, petitioned in various U.S. Court of Appeals for review of EPA's actions pursuant to Section 307 of the Act. These States argued first, that § 113 did not authorize EPA to impose duties on States, and second, that if the Act did authorize such action, the Federal government lacked the constitutional power to do so.

The U.S. Court of Appeals for the Third Circuit ruled first, holding that the Clean Air Act authorizes EPA to promulgate regulations which imposed program implementation and enforcement duties on States and that the Act is constitutional. *Pennsylvania* v. *EPA*, 500 F.2d 246 (1974). The Ninth and Fourth Circuits ruled next. Those courts, in order to avoid a constitutional holding, interpreted the Act not to grant authority to promulgate and enforce against States the regulations in issue. *Brown* v. *EPA*, 521 F.2d 827 (1975). *Arizona* v. *EPA*, 521 F.2d 825 (1975). *Maryland* v. *EPA*, 530 F.2d 215 (1975). Subsequently, the District of Columbia Circuit decided that while the Act did not authorize EPA to require States to adopt legislation and regulations to establish pollution control programs, that the Act did authorize EPA to adopt such regulations itself and to require the States to enforce them. *District of Columbia* v. *Train*, 521 F.2d 971, 994 (1975). The D.C. Circuit then held that the commerce power authorized the federal government to require States to establish exclusive bus lanes on state-owned roads, to prohibit States from registering,

for use on state-owned roads, automobiles which do not conform to prescribed pollution control equipment and omission standards, and to require States to purchase buses to augment state-owned bus systems. 521 F.2d at 994. However, the Court further held that the commerce power did not permit the federal government to require States to establish and operate programs to inspect motor vehicles. 521 F.2d at 995.

In the face of the conflicting decisions this Court granted petitions for certiorari filed by the Commonwealth of Virginia and by EPA with respect to the cases involving Arizona, California, the District of Columbia, Maryland and Virginia.

SUMMARY OF ARGUMENT

The issue in this case is whether the Federal government may require a State which owns and operates a source of air pollution to act to reduce that pollution.[3] EPA has reasonably determined that highways used by motor vehicles are such sources of pollution. Duties imposed on a State as the owner and operator of these highways do not threaten the viability of the States as independent entities in our federal system.

The Clean Air Act, unlike the Fair Labor Standards Act, which was struck down with respect to the States in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976), does not displace critical State determinations nor does it apply to a wide range of integral governmental functions of the States. Rather, the Clean Air

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[3] This brief will not discuss the statutory holdings of the Fourth and Ninth Circuits. The statutory interpretations by these Courts conflict with both the plain meaning and the legislative history of the Clean Air Act. Since the arguments which we assume will be made in EPA's brief will readily demonstrate the errors of the Courts' statutory rulings this brief will not duplicate those arguments.

Act is designed to encourage free and independent exercise of State choices and the Federal government's exercise of power is authorized only when a State fails to choose its own programs adequate to protect public health. Moreover, the Act preserves the right of the State to replace federally-promulgated programs at any time with adequate programs of the State's own choosing. The Act and EPA's actions affect only one State activity—ownership and operation of highways. The limited federal regulation of this activity does not impair the State's ability to carry out its integral governmental functions.

Pollution crossing from one State to another adversely affects the interests of all the component parts of our federal system. If a State cannot be required to assume responsibility for its polluting activities that burden will be shifted either to the people or to sister States.

A grant of immunity to the States in this case would require the creation of a vast federal enforcement system to regulate motor vehicle operators individually. This result would threaten the nation's ability to achieve the important national objective of reducing hazards to health from air pollution.

ARGUMENT

I

The Clean Air Act Authorizes EPA to Require Road Owners and Operators to Manage Road Use to Reduce Pollution

The EPA regulations challenged in this case require owners and operators of streets and highways (hereafter, roads) first, to require certain vehicles which use their roads to be inspected for emissions and to be equipped with pollution control devices, second, to reserve one or two lanes of some roads for use by buses, and third, to increase existing bus fleets. These regulations require management of road use in order to reduce emissions resulting from the operation of the road. The road is a source of pollution and the owner/operator of the source is required to take certain steps to reduce pollution caused by the operation of that source.

In this section of the brief it will be shown that EPA has acted reasonably in placing duties on the owner/operator of a road to reduce pollution caused by road use. The next section of the brief will address the constitutional issues raised by the fact that the owner/operator is a State.

When EPA must act to promulgate regulations under Section 110(c) of the Act, following the failure of a State to submit an adequate Plan, EPA may require the owner/operator of a source to abate pollution resulting from the source. *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (CA 1, 1974). Roads and other facilities provided for motor vehicles, such as parking lots, are sources of pollution and their owners and operators may be required to control that pollution.[4] The First Circuit has held that the Act authorizes EPA to require owner/operators of parking facilities to reduce motor vehicle-related pollution. *South Terminal Corp.* v. *EPA*, *supra*. 504 F.2d at 668. Roads are simply another type of facility provided for the use of motor vehicles. The D.C. Circuit agreed with this principle in *D.C.* v. *Train*, 521 F.2d at 989.

Many States, including the Commonwealth of Virginia, have agreed with EPA that it is appropriate to assign responsibility to the owner/operator of roads and parking facilities for the pollution resulting from the use of such facilities. Virginia has adopted a regulation requiring the owner or operator of a road, parking lot, or other facility which attracts motor vehicle traffic to acquire

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[4] *See* 38 *Fed. Reg.* 30632, November 6, 1973.

a permit for construction of a new facility or expansion of an existing facility. If the air pollution resulting from the use of the facility would interfere with the ambient air quality standards, the facility may not be built.[5]

Federal and State laws routinely require the owner or operator of a facility to manage its use by others when such control is needed to protect the health, safety, or welfare of those users or other people. The Federal Safety Appliance Act makes any interstate railroad common carrier liable for a $250 penalty for "hauling *or permitting to be hauled* on its line" any car which does not have the mandatory safety device. 45 U.S.C. § 6 (1972) (emphasis added). A railroad is responsible for equipment violations on the cars of another railroad just as it is responsible for its own. *United States* v. *Toledo, Peoria I. Western R. Co.*, 280 F.Supp. 243 (N.D. Ind. 1968). Moreover, a railroad in its capacity as track owner is liable for the violations on another company's cars (even though it did not haul them) merely because it permitted the other company to haul them on its line. *United States* v. *Northwestern Pacific R. Co.*, 235 F. 965, 968-69 (N.D. Cal. 1916).

Under the Federal Aviation Act, an airline is required to prevent use of its planes by any passenger who refuses to be searched for dangerous weapons. 49 U.S.C. § 1511(a) (1974).[6]

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[5] Regulations for the Control and Abatement of Air Pollution, §§ 2.706(a)(2), 2.706(d), Virginia State Air Pollution Control Board, December 1974. Other States which have adopted regulations similar to Virginia's include Alabama, Connecticut, Florida, Idaho, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Hampsire, New York, North Carolina, Oregon, West Virginia, and Wisconsin. *See* generally, Bureau of National Affairs, *Environment Reporter, State Air Laws.*

[6] "The [FAA] Administrator shall, by regulation, require any air carrier . . . to refuse to transport—

(1) any person who does not consent to a search of his person . . . to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine if it unlawfully contains a dangerous weapon, explosive, or other destructive substance."

In *Griggs* v. *Allegheny County* 369 U.S. 84 (1962), the Supreme Court held that the owner and operator of an airport is liable for the inverse condemnation of a residence made unlivable by the noise and vibration of planes approaching the airport's runways. The County, as "promoter, owner, and lessor" of the airport, was responsible for the planes' behavior because it gave the planes permission to take off and land and because it chose the location of the runways. *Id.* 87, 89.

State laws have long required the owner or operator of a tavern or a liquor store to prevent a minor from drinking on his premises, whether the minor brought the liquor with him or whether an adult purchased it there for him. An owner or operator who fails to meet these duties is often criminally liable. *See, e.g.*, Cal. Bus. I.P. Code § 25658; Ann. Code Md. Art. 2B, § 118(a) I(g).

More recently, States have enacted laws to require the owner or operator of a facility to prohibit or regulate smoking of tobacco on the premises. For example, Maryland laws require building owners to prohibit smoking in elevators and require bus carriers and operators of health care facilities to regulate smoking in their facilities.[7]

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[7] "The proprietor of a building containing any elevator whose use is available to the general public shall prohibit the smoking of tobacco products in that area." Ann. Code of Md. Art. 89, § 49C(A) (1975).

"The owner and operator of any interstate bus carrier shall prohibit the smoking of tobacco products while the bus is in public service." Ann. Code Md. Art. 78, § 35A(A) (1975).

"The director of every hospital, nursing home, health clinic, and physician's office shall devise, implement, and enforce a plan which

Thus, it is well established that duties may be placed on the owner or operator of a facility to regulate the use of that facility by others. The EPA regulations in issue in this case do not impose novel duties by regulating the owner/operator of the road. The regulations are examples of the broader area of regulatory and other law imposing responsibility on a property owner when the owner permits his property to be used by others in a manner which adversely affects public health or welfare.

II

The Clean Air Act May Constitutionally Require State Owners and Operators of Roads to Manage Such Roads to Reduce Pollution

A. *A State is Not Immune from All Regulation Under the Commerce Clause*

Prior to this Court's decision last term in *National League of Cities* v. *Usery*, 96 S.Ct. 2465 (1976) the apparent rule of law regarding State claims of immunity from commerce clause regulation was simply stated: the State was as subject to the regulation as any individual or corporation. *United States* v. *California* 297 U.S. 175 (1936); *Maryland* v. *Wirtz* 392 U.S. 183 (1968). However, the decision in *Usery, supra*, indicates that a majority of this Court no longer supports this broad rule.

In *Usery*, a majority of the Court struck down as infringing State sovereignty those portions of the Fair Labor Standards Act (FLSA)[8] which applied the Act's hour and wage provisions to State employees. The majority opinion analyzed the specific requirements of the

adequately protects the health of nonsmoking patients through the regulation of smoking products on the premises." Ann. Code Md. Art. 43, § 54I (1975).

[8] 29 U.S.C. § 201 *et seq.* (1976).

Act and the impact of those requirements on the States. The Court held that the provisions of the FLSA which fixed the minimum wages, maximum hours, and overtime wages to be paid to State employees, "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" and thus are not within the federal commerce power. *Usery*, 96 S.Ct. at 2474.

However, the Court did not suggest that all federal regulation of State activities would be viewed as outside the commerce power. Rather, the Court expressly reaffirmed commerce power regulation of State-owned rail transportation systems originally upheld in *United States* v. *California*, 297 U.S. 175 (1936), although the reasoning of the *California* decision was rejected. The Court also reaffirmed its decision in *Fry* v. *United States*, 421 U.S. 542 (1975), upholding a temporary freeze on the wages of State employees.

The majority opinion in *Usery* emphasized three factors: *direct displacement* of State determinations; the fact that the determinations in question related to *integral operations* of State programs; and the fact that the State activities were in *areas of traditional governmental functions*. In addition a fourth factor was considered in distinguishing the decision in *Fry, supra*, although not discussed in reaching the result in *Usery*: the importance of the specific federal interest asserted. *Usery* 96 S.Ct. at 2474.

Examination of the specific requirements of the FLSA discloses the features of that Act which disturbed the majority in *Usery*. First, Congress fixed specific levels for the employment terms covered by the legislation: a $1.90 an hour minimum wage, increasing to a $2.30 minimum by December 31, 1976;[9] a maximum regular work

[9] 29 U.S.C. § 206(b) (1976).

week of forty hours;[10] and a minimum overtime wage of one and one-half times the regular wage.[11] The Court apparently viewed congressional specification of these terms as directly displacing alternative State choices on wages and hours. Second, the employment terms covered by the Act—wages and hours—were central to the employer-employee relationship. Thus, the integral operations of the State's employment function were the subject of regulation. Third, the Act's requirements applied to almost every State employment category. Thus, the Act directly covered areas of State activity, such as "fire prevention, police protection, sanitation, public health, and parks and recreation," which the Court regarded as traditional governmental functions.

Thus, the FLSA imposed on the States requirements so specific that the States had no ability to choose among alternative methods of compliance; the only means of compliance permitted was strict adherence to the specific wage and hours terms selected by Congress. Further, the FLSA addressed the essential terms of the employer-employee relationship. Finally, the FLSA was essentially universal in its coverage of State areas of endeavor.

The following sections of this brief demonstrate that the Clean Air Act's features are so different from the FLSA that the intrusive impacts on State interests identified in *Usery* are not present in this case. As will be seen the Clean Air Act does not displace or restrict state choices; the Act does not impose any regulatory obligations on the State unless and until it is determined that the cumulative effects of regulatory programs applicable to private entities are insufficient to achieve the objectives of the Act; the obligations which may ultimately be imposed on the State are confined to the State's activity as owner and operator of roads; finally, the Act permits the State to reduce or avoid even these obligations if it chooses to shift additional responsibility for pollution reduction to the private sector.

[10] 29 U.S.C. § 207(a) (1976).

[11] *Ibid.*

B. *The Clean Air Act Does Not Displace State Choices*

Unlike the FLSA, the Clean Air Act does not impose specific substantive rules of conduct on the States. The FLSA established wage and hour standards which the States could not modify or avoid by choosing alternative programs. When Congress enacted the amendments to the FLSA which were challenged in *Usery*, *supra*, the States were left with almost no freedom to define their role in the federal program. The FLSA imposed an equal burden on all employers, public and private, with no opportunity for a State employer to shift or alter its share of the burden. No alternative save massive dismissal of State employees was available to a State which might wish to limit its obligations under the law. Even if it took such action the State would still be required to follow the federally specified wage and hour terms for its remaining employees.

In contrast, the Clean Air Act presumes that the State, not the federal government will select air pollution rules. The Act's recognition of the rights of the States to choose the means of pollution reduction enables the States to avoid any federal regulation of State activities and thereby preserves the ability of the States to structure their affairs.

Section 110 of the Clean Air Act, under which EPA has acted to adopt the regulation challenged herein, calls upon the States to choose the means to reduce air pollution so that the States rather than the federal government will control this important program. Broad criteria are set forth in Section 110(a)(2)(A)-(H) to provide a framework for EPA assessment of the adequacy of the

State's programs. However, as this Court has noted, this assessment is a limited one and does not authorize the federal government to substitute its choices for those made by the States. *Train* v. *NRDC*, 421 U.S. 60, 79 (1975). *Union Electric Co.* v. *Train*, 96 S.Ct. 2518, 2529 (1976).

Under Section 110 a State may choose the mix of emission reduction measures it feels best. If the State's program as a whole is adequate to attain the national air quality standards and the other essentially procedural criteria of Section 110 are met, EPA must approve the State's program:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. *Train* v. *NRDC*, *supra*, 421 U.S. at 79, (emphasis in original).

As this quotation observes, another feature of the Act is that EPA is permitted to adopt specific pollution control rules under Section 110 *only* when a State has failed to submit an adequate plan of its own. Section 110(c). Thus, the Act does not supplant the exercise of State power. Rather, it provides supplementary federal power in the event that the State's exercise of power is inadequate.

In addition to designing the Clean Air Act to preserve State choices, Congress gave the States the opportunity to minimize regulation of their activities by giving the States the primary responsibility to allocate the emission reduction burden. The Act thus respects State activities by allowing the States to place emission limitations on private sources of pollution in preference to limitations on publicly-owned pollution sources. For example, while the use of roads contributes significantly to photochemical oxidant and other pollution, the Act does not force the States to implement specific programs exclusively directed to road use. First, the State may choose to require maximum reduction of pollutants from various stationary sources,[12] thereby reducing the need to control emissions resulting from road use.

Second, if reduction of road-use emissions *is* necessary to achieve the air quality standards, the Act calls for the States to choose the programs and methods to reduce such pollution.

When a State fails to submit an adequate plan EPA must act, as in this case, to adopt federal regulations setting forth a pollution control program in that State. This action, however, does not limit the prerogatives of the State to choose a mix of control programs different from EPA's.[13] The Act provides that at *any* time the

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[12] Hydrocarbon emissions react with other pollutants to form photochemical oxidants. *See State of Texas* v. *EPA*, 499 F.2d 289 (1974) *cert. denied*, 44 U.S.L.W. 3746, (June 29, 1976). Stationary sources contribute large amounts of hydrocarbons, causing violations of the photochemical oxidant air quality standard. For example, stationary sources in the San Francisco area are estimated by the State of California to contribute 48% of total hydrocarbon emissions in 1977. "The State of California Implementation Plan for Achieving and Maintaining the National Ambient Air Quality Standards, Revision 3", dated June 21, 1973, submitted July 25, 1973 (Table III-2).

[13] In fact, as noted below, most of the programs adopted by EPA in this case were proposed by the States, not chosen independently by EPA.

States may submit revisions to the currently effective plans, including EPA promulgated regulations. Section 110(a)(3). Thus, any of the States before this Court may select programs to substitute for those promulgated by EPA and, if the minimum requirements of Section 110 are met, EPA must approve the revision. *NRDC* v. *Train, supra; Union Electric* v. *Train, supra.*

It should also be noted that the Clean Air Act allows the States to assign partial responsibility for attaining and maintaining ambient air quality standards to the federal government. A State may petition EPA to develop federal emission standards for stationary pollution sources pursuant to Section 111 of the Act.[14] While such federal standards do not necessarily reduce existing emissions they minimize increases in emissions due to expansion of existing sources or construction of new sources and thus aid the State's program to attain and maintain air quality standards. Similarly, the States can petition EPA for more stringent emissions standards for new motor vehicles pursuant to Section 202 of the Act.[15] In addition, State emission limitations apply to federally-owned facilities in the State. Section 118.

Just as the Clean Air Act itself respects the States' right to select programs to reduce air pollution, in every possible instance EPA has adopted measures selected by the States themselves. In the Washington, D. C. Metropolitan Area, the States of Maryland, Virginia and the District of Columbia proposed specific programs for the

[14] EPA action on such petitions is subject to judicial review if the State is not satisfied with EPA's response. *See Oljato Chapter* v. *Train*, 515 F.2d 654, (D.C. Cir. 1975).

[15] While specific standards for light-duty vehicles (automobiles and light trucks) were fixed by Congress through model year 1976, EPA retains authority to adopt more stringent standards for such vehicles for later model years and has always possessed discretion to develop more stringent standards for other significant mobile sources such as trucks, buses, and motorcycles. Section 202(a).

construction of exclusive bus lanes, the expansion of the bus fleet, and the inspection of motor vehicles. (38 *Fed. Reg.* 33703 (December 6, 1973)) In completing the plan for the D.C. Area, EPA approved these States' program choices. 38 Fed. Reg. 33705-06 (December 6, 1973). Similarly, for the State of Arizona, EPA adopted programs proposed by the State for motor vehicle inspection and maintenance, installation of vehicle pollution control equipment ("retrofit devices"), and carpooling, 38 Fed. Reg. 33369-71 (December 3, 1973). In California, the EPA-promulgated automobile inspection and maintenance program was proposed by the State in the State Plan Revision 3 [16] and each of the EPA promulgated vehicle use (VMT) reduction strategies (express bus lanes, carpool matching, parking supply management, mass transit incentives, parking surcharges) was proposed by one or more of the State/local task forces of the California Department of Transportation. *See* 38 *Fed. Reg.* 31232 *et seq.* (November 12, 1973) at 31233, 31237, 31241-44.

The impact of EPA's actions on State choices is therefore similar to, but less pervasive than the impact of the wage-freeze program upheld in *Fry* v. *United States, supra.* In most instances the States, not EPA, have chosen the strategies which require action by the State to reduce emissions resulting from road use.[17]

[16] *Supra*, n. 12.

[17] The Commonwealth of Virginia implies that EPA chose to require Virginia to enable the purchase of 475 buses for the Washington Area. Virginia Petition for Certiorari at 11. This is incorrect. Virginia itself, along with Maryland and the District of Columbia, selected the bus purchase strategy and identified the number of buses to be added in the metropolitan area. 38 *Fed. Reg.* 33706 (December 6, 1973).

C. *The Clean Air Act Does Not Affect Integral Operations of Traditional State Governmental Functions*

In *Usery*, *supra*, the Court discussed the State activities subjected to federal regulation under the FLSA. Because of the breadth of the FLSA's definition of "employer," virtually all State activities were regulated. Accordingly, the Court did not have to analyze closely the concept of a "traditional governmental function." Rather, the Court's opinion simply listed examples of activities regarded as traditionally governmental: "fire prevention, police protection, sanitation, public health, and parks and recreation." 96 S.Ct. at 2474.

By way of contrary example, the Court reaffirmed the holding of *U.S.* v. *California*, *supra*, on the ground that operating a rail transportation system was not a traditional governmental function. *Usery*, *supra*, at 96 S.Ct. 2475, n. 18.

Unlike the FLSA, EPA's actions under the Clean Air Act affect only one area of State activity: the ownership and operation of a highway system designed and managed for use by motor vehicles. Applying the reasoning in *Usery*, this State activity cannot be regarded as an integral part of its governmental activity.

The Court in *Usery* appears to suggest a test which asks whether the State's continued existence as a viable governing body in the federal system depends on its ability to make decisions independent of federal dictates regarding the activity in question. Thus, the Court in *Usery* asked whether the wage and hour decisions of a State employer are "functions essential to separate and independent existence," quoting *Coyle* v. *Smith*, 221 U.S. 559, 580 (1911) and *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). Citing *Fry* v. *United States*, 421 U.S. 542, 547 (1975), the Court referred to Congressional action which "impairs the States' integrity or their

ability to function effectively in a federal system . . . ." *Usery*, *supra*, at 96 S.Ct. 2470, 2474.[18]

When one employs the test of whether an activity is essential to the preservation of State government, it is not difficult to justify the result in *Usery*, once the principle is accepted that the federal commerce power is limited by the existence of such integral activities. It cannot be disputed that the employment of persons is a

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[18] No other test emerges from the majority's discussion in *Usery*. However, the use of the word "traditional" to describe the functions protected by the Court might give rise to an argument that a State activity which is initiated a "significant" number of years before federal regulation occurs should be immune from such regulation. Such a test should be rejected, for the length of time a State has engaged in a particular practice does not make the practice essential to preserve the viability of the State in the federal system. Moreover, such a test would create a constitutional doctrine of "adverse possession" wherein a State could alter the boundaries of the federal commerce power by acting in an area not presently regulated by Congress and, if Congress failed to enact legislation regarding the activity within a constitutionally "short" period of time, thereafter enjoy immunity from federal control of the activity.

In an era when many emerging technologies receive direct and indirect support from governmental bodies on all levels such an approach could cripple the power of the federal government to control State-supported technologies of the future whose use might endanger "the well-being of all the component parts of our federal system," *Usery*, *supra*, at 96 S.Ct. 2474. The development of nuclear energy has been promoted by the federal rather than State governments; but does the authority of the federal government to regulate State-owned nuclear power plants rest on that incident of history? Could a few score years of development work at State universities turn new technological activities, such as "genetic engineering," into traditional State governmental functions? Looking back in time one must ask whether actions by States at the turn of the 20th Century to provide, own, and operate systems of improved roads which permitted rapid expansion of motor vehicle use can be deemed integral governmental functions immune to federal control, simply because of the passage of time before Congress recognized the need for federal regulation. The answer to these questions must be no, because mere duration of action is neither a sufficient nor necessary element of sovereignty.

function essential to the preservation of State government, for without employees a State, indeed any institution, could not act. Nor is it difficult to accept that a State possesses much less control over its employment functions when wage and hour terms for State employees are fixed by another level of government.

In contrast to the result in *Usery*, it is very difficult to support a conclusion that State ownership and operation of highways is a function "essential to [States'] separate and independent existence." *Usery*, *supra*, at 96 S.Ct. at 2471. Undeniable State interests in the *governance* of highway systems are not pertinent since such interests can be protected by the State in the absence of State ownership and operation of the highways.[19]

The State may be interested in the existence of a good system of highways in order to facilitate commerce within the State. In addition the State has an obvious police power interest in regulating behavior on highways in the State. However, State ownership and operation of the highways is not essential to support these valid State interests.

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[19] The State is the subject of EPA's regulations because it is the owner/operator of the roads, not for any other reason. EPA does not seek to impose responsibility on the State simply because the State *regulates* the use of roads. This distinction between regulation and ownership was recognized but was misinterpreted by the Ninth Circuit in *Brown* v. *EPA*, *supra*:

> Nor do we believe that it is proper to equate the operation by a state of a railroad, an *economic activity* indistinguishable from that of private parties, with its *governance* of the use of highways and automobiles, an exercise of its police power with respect to commerce. 521 F.2d at 838 (citation omitted, emphasis in original).

The Ninth Circuit incorrectly assumed that EPA sought to regulate the States because of their *governance* of roads. That is incorrect; the State as *owner*, not as *regulator* of the road is the subject of EPA's regulations.

For example, other technological systems such as electric power systems and telephone systems are doubtless regarded as essential by the State; yet few States choose to own such systems. Rather, most States regulate the private owners of such systems through public utility commissions.

State regulation of highways and their users can also be accomplished without State ownership of the highways themselves. It is a commonplace that competent governments can exercise jurisdiction over all property within their territory without regard to its ownership. It is not questioned that the State has a strong and valid interest in regulating liquor stores and their patrons, yet this Court did not find State *ownership and operation* of liquor stores to be an essential function for purposes of intergovernmental tax immunity; *South Carolina* v. *United States*, 199 U.S. 437 (1905).

Most States implicitly recognize the distinction between ownership, operation, and regulation of highways by dividing these responsibilities between different agencies: typically the state police and department of motor vehicles for regulatory functions and a State highway or transportation department for construction and operation of the highways. *See*, *e.g.*, Code of Virginia, titles 33, 46.1, and 52.

Before the 20th Century when State ownership and operation of highway systems began to flourish, State regulation of roads without ownership was a common condition. In a continuation of the prevailing condition in the colonial period, provision of highways in the 18th and most of the 19th century was an activity carried on not by the States, but by local authorities using "statute labor" or by private turnpike corporations.[20] Between

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[20] Rae, J. B., *The Road and the Car in American Life* 12, 26 (MIT Press, Cambridge 1971).

1800 and 1850 most significant road-building was undertaken by private turnpike corporations.[21] The turnpikes constructed were noted by this Court as subject to State regulation even though they were not owned by the States.[22]

Until the turn of the 20th century, many States were prohibited by their constitutions from issuing bonds to build public works, including highway systems.[23] The first State to pass legislation empowering the State to aid the construction of highways was New Jersey in 1891.[24] It could hardly be argued that prior to acquiring and exercising their authority to build and operate highways that the States were less sovereign than they are today.

EPA's actions under the Clean Air Act focus on a particular transportation system—motor vehicles and the improved highways provided for their use. It is appropriate to examine further the State role in the development of this distinct and relatively recent technological system. The emergence of the automobile, the development of materials suitable for building substantial mileage of

[21] Rae, *supra*, at 18. From 1850 to 1900 little road-building of any sort occurred due to the pre-eminence of the railroad. *Ibid.* at 20.

[22] *Gibbons* v. *Ogden*, 9 Wheat. (21 U.S.) 1, 203 (1824).

[23] As late as 1913 the constitutions of the following twenty-one of the forty-eight States prohibited the issuance of bonds for public works: Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Louisiana, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin. U.S. Congress, Joint Committee on Federal Aid in the Construction of Post Roads, "Federal Aid to Good Roads," Committee Print, April 25, 1913, at 16. *See also*, American Public Works Association, *History of Public Works in the United States 1776-1976* at 65-66 (1976).

[24] Young, F. G., "Tendencies in Recent American Road Legislation," 2 U. of Oregon Bulletin 2, 16 (1905). *See also, History of Public Works in the United States, supra*, n. 23, at 70.

hard-surfaced roads conducive to motor vehicle use and the revolutionary changes in State policies from a condition of inaction to one of organized promotion of highway construction—all these events occurred during the three decades between 1890-1920.[25] In upholding Maryland's law requiring motor vehicle owners to register their cars and to pay a fee to the State this Court recognized the interdependence of road building and motor vehicle use, the recent expansion of State activities to include building improved roads, and the proprietary interest of the State in the "special facilities" it was providing the motor vehicle operator:

> "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways . . . . A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious." *Hendrick* v. *Maryland*, 235 U.S. 610, 622 (1915).[26]

[25] *History of Public Works in the United States, supra*, n. 23, at 66-70, 73, 74; Dearing, C. L., *American Highway Policy*, 45-58 (Brookings, 1942).

[26] In *Kane* v. *New Jersey*, 242 U.S. 160 (1916), Justice Brandeis emphasized the proprietary basis of the *Hendrick* decision. Quoting from *Hendrick* he concluded:

> "And it was expressly recognized that the purpose of the Maryland law 'was to secure some compensation for the use

State courts also recognized the novelty of the State activities in the highway area. *See, e.g., Saviers* v. *Smith*, 101 Ohio St. 132, 128 N.E. 269, 271 (1920):

> "It is within the common knowledge, and the court will take judicial notice of the entirely new use to which the roads of the country have been put within a comparatively few years, as well as of the enormous number of motor vehicles and the vast traffic conducted by means of them upon our highways . . . . More and more it becomes one of the important instrumentalities in in the conduct of the commerce and trade of the country. Moreover, by common consent there has been a general tendency to the construction of roads of a quality and character vastly superior to those which were constructed prior to the coming of the automobile."

The Court's discussion of the highway function in *Hendrick* v. *Maryland, supra,* suggests that highway building and ownership was recognized as a recent phenomenon and not viewed as purely governmental. This Court has never been called upon to decide whether highway ownership was an essential governmental function for purposes of federal tax immunity. However, the Court has not held other types of State-owned transportation systems essential to "safeguard the necessary independence of the State." *Helvering* v. *Powers*, 293 U.S. 214, 227 (1934) (street railway).[27] The State activity found to be non-

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of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.'" 242 U.S. at 169.

The State of Maryland and other States have enjoyed the benefits of their proprietorship of highways for some 60 years. It would be inappropriate for them to claim that their highway activity is exclusively governmental and thus immune from federal control now that the federal government simply seeks to apply to the States some of the responsibilities of proprietorship.

[27] *See also, Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 172 (1911); and this Court's discussion in *Usery, supra,* at 96 S.Ct. 2475, n. 18, of the result in *United States* v. *California, supra.*

essential in *Helvering* v. *Powers, supra,*—operation of a street railway—was brought about by another state activity only slightly less recent: the provision of improved highways for motor vehicles, whose success soon drove privately-owned street railways into bankruptcy, compelling public acquisition.[28]

These considerations demonstrate that the State activity to which the federal regulation is directed—ownership and operation of highways—is not integral to the performance of essential governmental functions of the States.

D. *States Must Be Responsible For Their Polluting Activities to Protect Strong Interests of the Federal System*

Vehicular air pollution in the United States threatens public health, crosses State boundaries, and requires a combination of actions which cannot be accomplished through exclusive action by one level of government.

A substantial proportion of the population of the United States is regularly exposed to air pollution levels which greatly exceed national air quality standards established to protect public health. Photochemical oxidant pollution reaching two and three times the primary health standard is not an uncommon occurrence throughout the country, including the States before this Court.[29]

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[28] *History of Public Works in the United States, supra* n. 23, at 177.

[29] The National Ambient Air Quality Standard for photochemical oxidants is 160 micrograms per cubic meter (ug/m³) for 1 hour. 40 C.F.R. § 50.9. In 1973, oxidant levels in California exceeded 400, 600 and sometimes 800 ug/m³ in a number of areas. In Fairfax County, Virginia, oxidant readings of 520 ug/m³ were recorded in 1973. In Phoenix, Arizona oxidant levels reached 450 ug/m³. In Baltimore, Maryland, levels of 490 ug/m³ were recorded and in the National Capital Area (DC-Md.-Va.) oxidant levels exceeded 800 ug/m³ at a Bethesda monitoring station. U.S. EPA, Office of Air Quality Planning and Standards, *Monitoring and Air Quality Trends Report, 1973*, EPA-450/1-74-007 (October 1974), Table D-1.

Moreover, pollution generated within one State does not remain there. Polluted air often travels hundreds of miles, crossing from the State of origin to sister States "downwind." [30] For example, recent studies show that a large portion of the pollution burden suffered by Connecticut and Massachusetts has traveled from New York and New Jersey.[31]

The population of the United States is distributed in a fashion that places a large percentage of the nation's people close to State borders. Over 110 million people live in major metropolitan areas located within 75 miles of a State border.[32] Thus, over 50% of the American people live in areas where they may be affected by polluted air not only from their own State but also from neighboring States.

In theory citizens can affect the policies and practices of their own State regarding air pollution from highway use by exercising their right to vote. However, such citizens have no representation in neighboring States whose programs relating to highway use may generate pollution which affects the health and welfare of such citizens. Given the evidence of interstate pollution problems available before and since the passage of the Clean Air Amendments of 1970, this impact on out-of-State populations is not merely conjectural.

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[30] Martinez and Meyer, "Urban-Nonurban Ozone Gradients and their Significance," Air Pollution Control Association, *Proceedings, Conference on Ozone/Oxidants—Interactions with the Total Environment* (1976) at 221.

[31] *Id.* at 225-6. Cleveland, W. S., *et al.*, "The Analysis of the Ozone Problem in the Northeast United States," *Proceedings, supra*, n. 30, at 109-120.

[32] Calculated from U.S. Office of Management and Budget, *Standard Metropolitan Statistical Areas* (rev. ed. 1975) and U.S. Department of Commerce, "Standard Metropolitan Statistical Areas defined by Office of Management and Budget, January 1, 1974," United States Maps, GE-50, No. 55.

This situation points up a basic difference between the impact of non-compliance by a State with the Clean Air Act and the impact of State non-compliance with the FLSA considered in *Usery*. If a State declines to pay the minimum wages prescribed by the FLSA any injury will be confined to that State's employees; neither the residents of the State in general, nor a sister State nor its residents will be adversely affected. In fact, the most likely effect on a sister State will be beneficial, since the sister State can either reduce its wage scales to the levels of the "non-complying" State or enjoy a competitive advantage in recruiting employees by paying higher wages in any categories where labor demand exceeds supply.

In contrast, a State which fails to control pollution from motor vehicle use can injure not only its own citizens but also the sister States whose borders its pollution crosses and the citizens of those States. A "downwind" State lying in the path of pollution from a State which refuses to control highway use may be injured in several ways. First, if the "downwind" State does nothing, the health and welfare of its citizens may be threatened by that pollution. Second, if the "downwind" State does act to reduce the pollution it receives, it is being forced to spend its tax dollars to solve a problem created in another State. Third, if the "downwind" State relies on direct action by the federal government to reduce the pollution it receives, its residents and those of other States, through their federal income tax payments, will be forced to contribute to a program to reduce pollution caused by another State's activity.

Therefore, unlike the facts in *Usery*, here the ability of the federal government to require compliance with the Act's requirements is necessary to prevent one State by its actions from injuring other States. In this case the assertion of complete immunity by one State diminishes the rights not only of the federal government, it would also infringe the rights of sister States.

Finally, the impact on the federal government of having to directly regulate motor vehicle use in each State should be examined and compared to the impact on the States of carrying out the EPA regulations themselves. The requirements for inspection of vehicles and establishment of exclusive bus lanes create a need for enforcement machinery to check compliance by individual motorists. The impact on the States of assuming these functions is small because they have an adequate enforcement system already in existence, namely their motor vehicle registration systems and their State and local traffic enforcement forces.

To ensure compliance with the inspection program the State need only add a condition to its existing vehicle registration procedure requiring that inspection of the vehicle have occurred. With respect to the exclusive bus lane strategy, existing State traffic forces which patrol the highways would acquire an added responsibility of preventing unauthorized use of the lanes by motorists. The States have failed to show that this added responsibility would impair the ability of these forces to carry out their existing duties.

If the federal government must establish its own forces to enforce requirements against each motorist the citizens of this country will either be left with dirty air or a substantially higher federal tax bill. Unlike the States the federal government does not have existing enforcement resources. If, as Virginia suggests,[33] a separate sticker system for inspection programs were required, the federal government would have to duplicate the resources of the State's motor vehicle registration system in each State where such a program is required. In addition, the federal government would have to establish duplicative highway patrol forces to check vehicles for inspection

[33] Virginia Petition for Certiorari at 7.

stickers and to enforce bus lane restrictions. Establishing these forces would involve hiring large numbers of personnel, patrol cars, office buildings, records systems and additional sets of government forms for motorists to complete. All of these resources would duplicate what the States already possess and would impose a large and avoidable expense on all taxpayers.

We fear that the result of a finding of State immunity in this case would not be confined to a waste of taxpayers' dollars. The impasse which has existed for the past four years with no action by either the federal or the States' governments will continue for the forseeable future if EPA's actions are found unconstitutional. The result will be additional years of exposure to harmful pollution levels for millions of people who need the protection of their government but witness quarrels instead. We do not believe that the State's decisions to own and operate highways for polluting vehicles are so essential to their continued "separate and independent existence" that immunity must be found in the face of the adverse consequences of such a finding.

The vehicular pollution control programs addressed by EPA's regulations in these cases require significant changes in transportation habits. States have been reluctant to make these changes in the past. We believe that this reluctance will continue unless each State is convinced that other States with similar pollution problems will make equal efforts to clean the air. The actions of the federal government which are challenged in these cases help to assure each State that the necessary efforts will be made by all States with severe pollution problems.

CONCLUSION

Our discussion has shown that the Clean Air Act does not intrude on the State's essential sovereign functions. The Act sets broad public health objectives and does not

displace State choices as to how to achieve those objectives. The Act imposes duties on the States only as a last resort, only where the States operate polluting sources, and only until the States propose some alternative action to reduce overall pollution to levels protecting public health.

The Commonwealth of Virginia has stated, "Power without responsibility produces an unhealthy situation, whether in the private or the public sector." [34] We agree. The States have exercised power to build and operate roads and have not assumed responsibility for the resulting pollution. They have allowed a literally unhealthy situation to develop; a situation which will continue as long as the States avoid their responsibility.

This Court has recognized that the Tenth Amendment is an express declaration of constitutional policies protecting the State's rights to continued existence. *Fry* v. *United States*, *supra*. Yet the Tenth Amendment also recognizes the rights of the people of the United States. The interests of the people in breathing air which does not damage their health will be impaired if the States may not be held responsible for their polluting activities. The Constitution need not be construed to endorse allegations of State sovereignty which are made at the expense of the people's health.

Accordingly, it is suggested that this Court reverse the decisions of the Ninth and Fourth Circuits below and reverse in part the decision of the District of Columbia Circuit below.

Respectfully submitted,

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[34] Virginia Petition for Certiorari at 15.